MOTION FILED OCT 7 1969 SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 632

BEATRICE ALEXANDER, *et al.*,
Petitioners,

v.

HOLMES COUNTY BOARD OF EDUCATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE MEMORANDUM AMICUS CURIAE AND FOR IMMEDIATE CONSIDERATION THEREOF AND MEMORANDUM AMICUS CURIAE FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

JOHN W. DOUGLAS
GEORGE N. LINDSAY
Co-chairmen
BETHUEL M. WEBSTER
CYRUS R. VANCE
ASA SOKOLOW
JOHN SCHAFER
LOUIS F. OBERDORFER
JOHN DOAR
RICHARD C. DINKELSPIEL
ARTHUR H. DEAN
LLOYD N. CUTLER
BRUCE BROMLEY
BERL I. BERNHARD
1660 L Street, N.W.
Washington, D. C. 20036
Attorneys for Amicus Curiae,
Lawyers' Committee for Civil Rights Under Law

Of Counsel:
TIMOTHY B. DYK
MICHAEL R. KLEIN
DEANNE C. SIEMER

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MOTION FOR LEAVE TO FILE MEMORANDUM AMICUS CURIAE AND FOR IMMEDIATE CONSIDERATION THEREOF

The Lawyers' Committee for Civil Rights Under Law hereby respectfully moves for leave to file the attached Memorandum Amicus Curiae in the above-entitled case. Petitioners have consented to the filing of this memorandum. Respondent United States of America (a plaintiff below) has also consented. Consents have been requested from the respondents who are defendants below in the fourteen cases, but as yet consents from these respondents have not been received.

Since the responses in this case are due to be filed this Wednesday, October 8, 1969, and since this Court may consider this case at this week's Conference, this motion and the attached Memorandum Amicus Curiae cannot be considered by the Court if the non-consenting respondents are afforded time to respond to this motion under Rule 35(4). Moreover, we believe that their positions on the merits may be adequately presented in their responses to the petition for certiorari. Accordingly, applicant respect-

fully requests that this motion and the attached Memorandum Amicus Curiae be considered together with the petition for certiorari and the responses to the petition, and that, pursuant to Rule 35(4), consideration of this motion and the attached Memorandum Amicus Curiae not be postponed pending receipt of papers in opposition from the non-consenting respondents.

Applicant respectfully submits that the attached Memorandum Amicus Curiae will be of assistance to this Court. The reasons that applicant believes its motion should be granted are as follows:

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963, following a conference of lawyers at the White House called by President John F. Kennedy. The formal organization of the Lawyers' Committee for Civil Rights Under Law is that of a non-profit private corporation whose principal purpose is to involve private lawyers throughout the country in the struggle to assure all citizens their civil rights. The membership of the Committee includes eleven past presidents of the American Bar Association and two former Attorneys General.

Since 1964, the Committee has operated a law office in Jackson, Mississippi, which has handled more than 2,000 civil rights cases. Over 150 attorneys from all parts of the United States have served as unpaid volunteers in the Jackson office in aid of the permanent staff there. The Committee's national and local offices have actively engaged the services of the private bar in addressing a range of legal problems in such areas as education, housing, employment, economic development, and the administration of justice. In the field of education, both the national staff and the local committees have undertaken well over a score of projects to promote quality education and to assure its availability to all citizens, regardless of income level or race. The Committee has recently renewed its offer to assist the Department of Justice in carrying out national objectives in the civil rights area.

In the two weeks which have passed since the filing of the petition for certiorari, federal officials charged with enforcement responsibilities in this field have placed in question the capacity of the federal government to enforce an order for immediate desegregation. The Lawyers' Committee for Civil Rights Under Law, in the attached memorandum, deals directly with this most relevant issue which is not presented in the petition for certiorari. Moreover, applicant deals with an additional question—not fully treated in the petition—whether community opposition is an adequate ground for delay in enforcement.

Accordingly, the Committee respectfully requests that this Court grant leave to file the attached Memorandum Amicus Curiae, and consider this motion and the Memorandum together with the petition and responses.

Respectfully submitted,

JOHN W. DOUGLAS

GEORGE N. LINDSAY
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1660 L Street, N.W.
Washington, D. C. 20036
Attorneys for Amicus Curiae,
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MEMORANDUM AMICUS CURIAE FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

QUESTION PRESENTED

Whether, fifteen years after this Court's decision in *Brown* v. *Board of Education*, enforcement of elementary school desegregation in the State of Mississippi should be further delayed.

INTEREST OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

The Lawyers' Committee for Civil Rights Under Law was organized on June 21, 1963, following a conference of lawyers at the White House called by President John F. Kennedy. The formal organization of the Lawyers' Committee for Civil Rights Under Law is that of a non-profit private corporation whose principal purpose is to involve private lawyers throughout the country in the struggle to assure all citizens of their civil rights. The membership of the Committee includes eleven past presidents of the American Bar Association and two former Attorneys General.

Since 1964, the Committee has operated a law office in Jackson, Mississippi, which handled more than 2,000 civil

rights cases. Over 150 attorneys from all parts of the United States have served as unpaid volunteers in the Jackson office in aid of the permanent staff there. The Committee's national and local offices have actively engaged the services of the private bar in addressing a range of legal problems in such areas as education, housing, employment, economic development, and the administration of justice. In the field of education, both the national staff and the local committees have undertaken well over a score of projects to promote quality education and to assure its availability to all citizens, regardless of income level or race. The Committee has recently renewed its offer to assist the Department of Justice in carrying out national objectives in the civil rights area.

REASONS FOR GRANTING THE WRIT

The Time for Additional Delay in School Desegregation Is At An End.

This is not the first time elements of the school system of the State of Mississippi have appeared before the federal courts in matters of school segregation. In the fifteen years since the first *Brown* decision, 347 U. S. 483 (1954), at least fourteen decisions involving Mississippi school segregation have been rendered by federal courts.[1] Nearly all

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[1] *United States* v. *Indianola Municipal Separate School Dist.*, 410 F. 2d 626 (5th Cir. 1969); *Anthony* v. *Marshall County Bd. of Educ.*, 409 F. 2d 1287 (5th Cir. 1969); *Henry* v. *Clarksdale Municipal Separate School Dist.*, 409 F. 2d 682 (5th Cir. 1969); *United States* v. *Greenwood Municipal Separate School Dist.*, 406 F. 2d 1086 (5th Cir. 1969); *Adams* v. *Mathews*, 403 F. 2d 181 (5th Cir. 1968); *United States* v. *Hinds County School Bd.*, 402 F. 2d 926 (5th Cir. 1968); *Singleton* v. *Jackson Municipal Separate School Dist.*, 348 F. 2d 729 (5th Cir. 1965); *United States* v. *Madison County Bd. of Educ.*, 326 F. 2d 237 (5th Cir.), *cert. denied*, 379 U. S. 929 (1964); *Meredith* v. *Fair*, 313 F. 2d 532 (5th Cir. 1962), *cert. denied*, 372 U. S. 916 (1963); *Meredith* v. *Fair*, 313 F. 2d 534 (5th Cir. 1962); *Coffey* v. *State Educational Finance Comm'n*, 296 F. Supp. 1389 (S. D. Miss. 1969); *Franklin* v. *Quitman County Bd. of Educ.*, 288 F. Supp. 509 (N. D. Miss. 1968); *United States* v. *Natchez Special Municipal Separate School Dist.*, 267 F. Supp. 614 (S. D. Miss. 1966); *United States* v. *Biloxi Municipal School Dist.*, 219 F. Supp. 691 (S. D. Miss. 1963), *aff'd*, 326 F. 2d 237 (5th Cir.), *cert. denied*, 379 U. S. 929 (1964).

have issued the same unmistakable declarations: Segregation must end, good faith compliance with this Court's decision in *Brown*—which as an interpretation of the Fourteenth Amendment is "the supreme law of the land"[2]—is constitutionally required.

As the record painfully reveals, however, good faith compliance has not been forthcoming. Five thousand six hundred and ~~eighty~~ twenty-two days have passed since this Court's landmark decision in 1954. For those fifteen years the school systems in Mississippi have failed to effect good faith compliance. If one lesson has been learned during these past fifteen years, it is that the ingenuity of the officials of the Mississippi school system should not be underestimated. Now, on the eve of the first meaningful elementary school desegregation in the State's history, the defendants have apparently succeeded in convincing the Secretary of Health, Education and Welfare, who in turn, has convinced the District Court, that further delay should be afforded because:

> "The administrative and logistical difficulties which must be encountered and met in the terribly short space of time remaining must surely . . . produce chaos, confusion and catastrophic educational setback. . . ."[3]

The ring is familiar if the source is not.

The Secretary's reference is to the defendant's assertion that the petitioners' constitutional rights must await (1) the redrawing of bus routes, (2) the reassignment of teachers, (3) the conversion of classrooms and (4) a pro-

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[2]*Cooper* v. *Aaron*, 358 U. S. 1, 18 (1958).

[3]Letter of Secretary Finch to the Court of Appeals and the judges of the District Court. Transcript of Record in the Court of Appeals, Vol. IV, Document No. YY, Exhibit 2.

gram of preparation of the teachers and students involved.[4] This fourth ground appears to be a euphemism for overcoming community resistance.

The supposed administrative and logistical difficulties asserted in support of the request for a further delay are wholly inadequate, particularly in the light of the long delay already encountered.[5] There is nothing in the record to demonstrate that the redrawing of bus routes could take more than a few days. Even assuming that the second and third reasons (reassignment of teachers and the conversion of classrooms) will involve difficulties of substance for the school boards involved, it is scarcely credible that they outweigh the long overdue promise of equality or that these supposed difficulties cannot be adequately resolved after desegregation has been achieved.

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[4]Findings of Fact and Conclusions of Law of the District Court (Aug. 26, 1969), as reproduced by Petitioners in Appendix D at p. 65a of their Petition for Writ of Certiorari.

[5]As this Court noted in *Watson* v. *Memphis*, 373 U. S. 526, 529-30 (1963), in ordering immediate desegregation of the Memphis city parks:

> "In considering the appropriateness of the equitable decree entered below inviting a plan calling for an even longer delay in effecting desegregation, we cannot ignore the passage of a substantial period of time since the original declaration of the manifest unconstitutionality of racial practices such as are here challenged, the repeated and numerous decisions giving notice of such illegality, and the many intervening opportunities heretofore available to attain the equality of treatment which the Fourteenth Amendment commands the States to achieve. These factors must inevitably and substantially temper the present import of such broad policy considerations as may have underlain, even in part, the form of decree ultimately framed in the *Brown* case. Given the extended time which has elapsed, it is far from clear that the mandate of the second *Brown* decision requiring that desegregation proceed with 'all deliberate speed' would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. *Brown* never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools. . . ."

Recent statements on behalf of the Department of Justice, if accurately reported,[6] would suggest that the request of the United States for additional delay, which was convincing to the District Court, is based, in significant part, upon the fourth ground—community resistance—and upon an asserted lack of adequate manpower in the Civil Rights Division to enforce immediate desegregation. The Department's reliance on these factors is, in our view, unwarranted since neither of these arguments is sufficient or even cognizable by the courts.

1. This Court Has Specifically Held That Desegregation Must Not Be Delayed Because of Community Resistance.

From the beginning of the battle for equality of educational opportunity this Court has made it clear that community resistance is not an accepted basis for delay. As early as 1917 this Court in *Buchanan* v. *Warley,* 245 U. S. 60, 81, invalidating a zoning ordinance enforcing separation of the races, held that the avoidance of "race conflicts" was not an adequate reason for continued segregation. In the second *Brown* decision itself, 349 U. S. 294, 300 (1955), this Court declared:

> "[I]t should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

Three years later, when faced with the spectre of coordinated state resistance to the enforcement of desegrega-

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[6] "Nixon Aide Warns Quick Integration Can't Be Enforced," *The New York Times,* p. 1, col. 3 (Sept. 30, 1969); "Leonard Defends U. S. School Policy," *The New York Times,* p. 25, col. 1 (Oct. 3, 1969). (The full text of these articles is set forth as Appendix A to this Memorandum.) In a September 30, 1969, statement the Department conceded that, if the Supreme Court reversed the decision below, the Department would enforce the order entered pursuant to the Supreme Court's mandate.

tion, the decision in *Cooper* v. *Aaron*, 358 U. S. 1 (1958), was no less emphatic. Specifically rejected there was the very concept upon which respondents' contentions are, in large part, premised: the capacity of opposition to create practical difficulties in enforcement, and then to successfully offer those difficulties as proof of the prematurity of a decree to desegregate now.[7]

2. The Alleged Inadequacy of the Enforcement Resources of the United States Department of Justice Is No Ground for Further Delay.

As we have noted, the United States Department of Justice has publicly suggested that delay is in order because the Department lacks adequate resources to enforce immediate desegregation. But "it is an 'inadmissible suggestion' that action might be taken in disregard of a judicial determination." *Powell* v. *McCormack*, 395 U. S. 486, 549 n. 86 (1969).

> "[T]he Attorney General of the United States, has a constitutional obligation to eliminate racial discrimination. . . . Failure on the part of any of these Government officials to take legal action in the event that racial discrimination does exist . . . would constitute dereliction of official duty." *United States* v. *Frazer*, 297 F. Supp. 319, 323 (M.D. Ala. 1968).

Moreover, the Department's contentions are without factual foundation. The Department has great flexibility in allocating resources. If, at any given time, there is an insufficient number of attorneys in the Civil Rights Division, the Attorney General may delegate civil rights functions to attorneys from other divisions within the

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[7] See also *Watson* v. *Memphis*, 373 U. S. 526, 535-37 (1963); *Wright* v. *Georgia*, 373 U. S. 284, 293 (1963); *Taylor* v. *Louisiana*, 370 U. S. 154 (1962); *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Brown* v. *Board of Educ.*, 349 U. S. 294, 300 (1955).

Department. 28 U. S. C. § 510 (Supp. III 1965-67). Should there be insufficient manpower within the Department, the Attorney General is authorized to specialiy appoint any attorney to assist him in any proceedings, civil or criminal, whether or not the attorney is a resident of the district in which the proceeding is brought. 28 U. S. C. § 515 (Supp. III 1965-67). The Lawyers' Committee stands ready to assist in the recruitment of the services of as many volunteer attorneys as may be needed by the Department for the purpose of enforcement of desegregation orders in these and other cases.[8]

[8]The Lawyers' Committee volunteers would offer their services without compensation, but token payment is required by statute. 31 U. S. C. § 665(b) (1964).

CONCLUSION

Certiorari should be granted; the order of the Court of Appeals of August 28, 1969, should be summarily reversed; the order of the Court of Appeals of July 3, 1969, should be reinstated; and the case remanded for immediate appropriate action in order that desegregation may be immediately effected.

Respectfully submitted,

JOHN W. DOUGLAS
GEORGE N. LINDSAY
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BRUCE BROMLEY
BERL I. BERNHARD
1660 L Street, N.W.
Washington, D. C. 20036
Attorneys for Amicus Curiae,
Lawyers' Committee for
Civil Rights Under Law

Of Counsel:
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DEANNE C. SIEMER

October 7, 1969

APPENDIX A

The New York Times, September 30, 1969

NIXON AIDE WARNS QUICK INTEGRATION CAN'T BE ENFORCED

Rights Chief Says "Nothing Would Change" If Court Told South to Act Now

By FRED P. GRAHAM, Special to The New York Times

WASHINGTON, Sept. 29—The chief of the Justice Department's Civil Rights Division said today that if the Supreme Court should rule in a pending case that schools must integrate immediately throughout the South the order could not be enforced.

Referring to an appeal that the Court has already agreed to consider on an accelerated schedule, Jerris Leonard, an Assistant Attorney General, declared that "if the Court were to order instant integration nothing would change. Somebody would have to enforce that order."

"There just are not enough bodies and people" in the Civil Rights Division "to enforce that kind of a decision," Mr. Leonard said at a news conference.

Appeal in Mississippi

The N.A.A.C.P. Legal Defense and Educational Fund Inc. has asked the Supreme Court to discard its "all deliberate speed" formula for school desegregation and to demand immediate abolition of racially identifiable schools across the South.

The request was made in an appeal of a desegregation delay that was granted to 30 Mississippi school districts at the behest of the Nixon Administration.

Mr. Leonard's remarks raised the possibility that the Supreme Court could find itself, for the first time since it declared public school segregation unconstitutional in 1954, in the position of issuing a school desegregation order without full expectation that it could or would be enforced by the executive branch.

Mr. Leonard called the news conference to respond to a group of dissident lawyers on his staff who have protested that the Nixon Administration has softened civil rights enforcement.

The dissident group released today the text of a statement of protest that they delivered last month to Mr. Leonard, Attorney General John N. Mitchell and President Nixon.

The statement charged that the Government's action in granting the Mississippi desegregation delay indicated "a disposition on the part of responsible officials of the Federal Government to subordinate clearly defined legal requirements to nonlegal considerations when formulating the enforcement policies of this division."

The lawyers charged that by basing civil rights decisions on "other considerations" than the law, the Administration "will seriously impair the ability of the Civil Rights Division, and ultimately the judiciary, to attend to the faithful execution of the Federal civil rights statutes."

The statement reportedly bore the signatures of 65 of the 74 nonsupervisory "line" attorneys in the Civil Rights Division.

Seeks Court Compliance

Attorney General Mitchell was asked about the statement today at a news conference in Miami, where he is attending the meeting of the International Association of Chiefs of Police.

He denied published reports that one of the "other considerations" that prompted the delay was a hint by Senator John C. Stennis of Mississippi that he would not give the Administration's antiballistics missile project his full support unless the delay were granted.

"That is completely false," Mr. Mitchell said. He added that "the objective of the Justice Department is to comply with the Court decision and statutory requirements."

Mr. Mitchell said he did not "presume that there would be any need to take action" against the dissident lawyers. Mr. Leonard said he had not been embarrassed by the ferment within his division and said he was confident that the line attorneys would cease their protests now that the Government's policy has been clarified.

Sources within the dissident group said that their statement was released today after having been kept secret for a month because the group believed that Mr. Leonard had not given assurances that the Justice Department would push school desegregation vigorously. But the lawyers said they did not know what further protest action, if any, their group would take.

Request by Finch

Mr. Leonard stressed repeatedly throughout his 45-minute news conference that the threat of school boycotts and school-closings by diehard whites in the South could retard the pace of school desegregation. The dissident attorneys have charged that this official attitude could encourage Southern whites to defy the law.

Mr. Leonard disclosed that Robert H. Finch, Secretary of Health, Education and Welfare, asked the Federal judges who had jurisdiction over the Mississippi case for the delay last month without first consulting Mr. Leonard, who had ultimate responsibility for the handling of the case.

But Mr. Leonard agreed with Mr. Finch's opinion that the time was too short to implement the desegregation plans in the few days that remained before the start of the school year. The judges granted the delay, which would put off major integration moves in the schools for at least a year.

If the delay had not been obtained, Mr. Leonard said, "I think we would have been faced with massive litigation efforts, school closings, and massive boycotting. It would have taken years and years to bring these districts back into line."

He predicted that with a year in which to lay the groundwork for desegregation, it will be accomplished smoothly in 1970.

In their appeal to the Supreme Court, the legal defense fund's lawyers contend that the possibility of delay has encouraged Southern school officials to make no plans for desegregation and then to plead at the last moment that there is inadequate time to prepare for desegregation without disrupting the schools.

The defense fund asked the Justices to give the appeal a speedy hearing and to order immediate desegregation of all Southern schools. The Court promptly announced that it will decide soon after the new Court term begins on Oct. 6 whether or not it will hear the appeal.

In the past, when the Court has agreed to accelerate its normal procedures, it has often developed that the justices were impressed with the contentions of the party seeking the speedy hearing.

The New York Times, October 3, 1969

LEONARD DEFENDS U. S. SCHOOL POLICY

Says Critics of Rights Stand 'Run Off at the Mouth'

WASHINGTON, Oct. 2 (AP)—Assistant Attorney General Jerris Leonard defended the Nixon Administration's school desegregation policy today, calling its critics "a lot of people who are frankly running off at the mouth."

Mr. Leonard, chief of the Justice Department's Civil Rights Division, also said he had no intention of quitting because of dissension among his lawyers over Administration policies.

His comments came at an impromptu news conference after Garry J. Greenberg, who resigned yesterday at the request of Mr. Leonard, said, he "would not and could not defend the Government's position."

Insisting that there had been no slowdown in school desegregation, Mr. Leonard said, "take the Mississippi situation out and give me one example where we have not vigorously enforced the civil rights laws."

In order to accomplish what some critics propose, Mr. Leonard said, "no one could make a statement that didn't advocate immediate, strict compliance with the law without regard to educational factors."

"I reject that 1,000 per cent," he said. "You cannot desegregate a school district that is presided over by recalcitrant school board members by simply issuing an edict."

Cites Times Editorial

Such a situation, he said, would put "school board members in the jail houses and kids in segregated schools."

Asked about statements by Federal judges who charged that a July policy statement was "a red herring across the path of progress toward desegregation," Mr. Leonard said, "I don't care if its judges, lawyers, legislators or whoever disagrees."

He took particular issue with The New York Times, saying an editorial yesterday was "picayunish and pusillanimous" and written by someone uninformed.

Asked about critical statements by the Commission on Civil Rights and some Congressmen, Mr. Leonard remarked, "I think you've got a lot of people who are frankly running off at the mouth who don't know what the facts are."